AKI KONSULT

v.

BELMONT PROPERTIES SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LC VOHRAH J
[CIVIL SUIT NO. P. 192 OF 1981]
22 MAY 1982

CIVIL LAW ACT: *Judgment by default - Discretion of Judge to set aside default judgment - Whether any triable issue.*

This was an application by the defendants for an order that the judgment in default of defence obtained by the plaintiffs on 21 December 1981 be set aside. The defendants did not file their defence although the plaintiffs' solicitors gave the defendants' solicitors the required 48 hours notice to file the defence.

Held:

[1] The Court is satisfied that an arguable or triable issue had been disclosed in the affidavits in support of the defendants' application to show a defence on the merits.

[2] The Court had no reason to doubt that it was only through inadvertence on the part of the defendants' Solicitors due to the misplacement of the letter from the plaintiffs' solicitors giving the defendants' solicitors the required 48 hours notice to file the defence that no statement of defence was in fact filed.

[3] On the affidavit evidence the defendants' solicitors would not have knowingly allowed the judgment to be signed against defendants had the letter not been misplaced.

[4] In the circumstances, the judgment should be set aside upon the condition that the defendants bear all the costs thrown away.

[Application allowed. Defendants to bear costs thrown away.]

Cases referred to:
Evans v. Bartlam [1937] AC 473
Burns v. Kondel [1971] 1 Lloyd's Rep 554
Esso Standard Malaya Bhd. v. Southern Cross Airways (Malaysia) Bhd. [1972] 1 MLJ 168
Pernas Trading Sdn. Bhd. v. Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124
Ching Yuen Tung v. BEP Akitek [1978] 1 MLJ 211

Legislation referred to:
Contracts Act 1950, s. 183
Rules of Supreme Court [UK], O. XIII r. 10, O. XXVII r. 15
Rules of the Supreme Court 1957, O. 14

For the applicants/defendants - I. De Silva
For the respondents/plaintiffs - B.S. Lau

JUDGMENT

LC Vohrah J:

This was an application by the defendants for an order that the judgment in default of defence obtained by the plaintiffs, a firm of architects, on 21 December 1981 be set aside (See Enclosure 7).

I heard this matter in Court as at chambers on 14 May 1982 and gave my decision in Chambers on 18 May 1982 allowing the application.

My reasons for doing so are as follows. In the case of *Evans v. Bartlam* [1937] AC 473 at p. 479, 480, where the principles relating to the exercise of a judge's discretion to set aside a judgment obtained either by default of appearance under O. XIII r. 10 or by default of pleading under O. XXVII r. 15 of the English Rules of Supreme Court, 1883 were considered at length in the House of Lords, Lord Atkin had this to say:

> I agree that both rules, O. XIII. r. 10, and O. XXVII. r. 15, give a discretionary power to the Judge in Chambers to set aside a default judgment. The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained, regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

In the same case at 489 Lord Wright expressed his own views on the matter thus:

> In a case like the present there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not *prima facie* desire to let a judgment pass on which there has been no proper adjudication.

Further, in the comparatively recent Court of Appeal case of *Burns v. Kondel* [1971] 1 Lloyd's Rep 554 , Lord Denning M.R., went a step further to explain in his typical succinct style the meaning of "defence on the merits" in cases where the Court is called upon to exercise its powers to set aside a judgment in default as follows:

> We all know that in the ordinary way the Court does not set aside a judgment in default unless there is an affidavit showing a defence on the merits. That does not mean that the defendant must show a good defence on the merits. He need only show a defence which discloses an arguable or triable issue. ...

The question I had to decide in the defendants' application was whether a triable issue had been disclosed in the affidavits in support of the application. The first affidavit affirmed by the solicitor having conduct of the defendants' case on 21 January 1982 (See Enclosure 6) contained an averment to the effect that the defendants were at all material times acting as agents of Kris Services Sdn. Bhd. and that the plaintiffs must have known of this because they had demanded payment of the sum claimed in the suit by an invoice dated 17 May 1977 addressed to Kris Services, that is, to the principals themselves, and also the latter were in fact at the time the actual owners of the land in respect of which they were appointed to render architectural services and for which the claim for payment is made in the instant suit. Further, it was averred that from the letter JT-30, exhibited to the affidavit-in-reply affirmed on 20 April 1982 by a partner of the plaintiff firm (See Enclosure 14), when a payment was

made to the plaintiffs by the defendants in 1975 and the receipt for such payment was noted in the letter to have been sent to Kris Services, it was obvious that a relationship of principal and agent did exist between the defendants and Kris Services. That being the case, it was contended that by virtue of s. 183 of the Contracts Act 1950 which reads:

> In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.
>
> Such a contract shall be presumed to exist in the following cases:
>
> (a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
>
> (b) where the agent does not disclose the name of his principal; and
>
> (c) where, the principal, though disclosed, cannot be sued.

it was clear that in law Kris Services should have been sued and not Belmont Properties Sdn. Bhd. I thought this contention fell within what was envisaged by Lord Denning when he explained that to show a defence on the merits the defence need only raise an arguable or triable issue. It was, however, submitted by counsel for the plaintiffs that what was contended by the defendants amounted to a mere allegation of the existence of an agency and that, in any event, if I understood her correctly, the letter of appointment dated 22 April 1974 (See CBK-2 exhibited to Enclosure 6) by virtue of its letter-head entitled "Belmont Properties Sdn. Bhd." clearly showed that the appointment was made by the defendants themselves and that the document must be construed as it stood. In support of her contention she referred to three authorities, namely, *Esso Standard Malaya Bhd. v. Southern Cross Airways (Malaysia) Bhd.* [1972] 1 MLJ 168, *Pernas Trading Sdn. Bhd. v. Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124 and *Ching Yuen Tung v. BEP Aketik* [1978] 1 MLJ 211. The first two, however, relate to applications for summary judgment under O. 14 of the Rules of the Supreme Court, 1957 and the third case relates to a decision after a full trial. In each of these three cases a statement of defence had been filed and the Court was therefore in a position to make its finding on the basis of the pleadings filed by both parties and in the light of the evidence available. I thought these cases were distinguishable from the case under consideration where no opportunity had yet been given to the defendants to present their case by way of a statement of defence and where I thought the defence had a lower burden of proof in showing a triable issue than a plaintiff endeavouring to obtain summary judgment. In any event, it was clear from the affidavit evidence that the solicitors for the plaintiffs were themselves until 4 June 1981 (See CBK-1A exhibited to Enclosure 8) agreeable to the defence being filed out of time. I had no reason to doubt that it was only through inadvertence on the part of the solicitors for the defendants due to the misplacement of the letter for the plaintiffs' solicitors giving the defendants' solicitors the required 48 hours notice to file the defence that no statement of defence was in fact filed. Had the letter not been misplaced I had no doubt, on the affidavit evidence before me, that the solicitors for the defendants would not have knowingly allowed the judgment to be signed against the defendants.

In the circumstances, I thought the judgment should be set aside upon the condition that the defendants bear all the costs thrown away as is usual in a case of this nature and so ordered.

Also found at [1982] CLJ 419